UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PETER DIXON,

Plaintiff,

v.

CITY OF OAKLAND, et al.

Defendants.

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No. C-12-05207 DMR

ORDER GRANTING DEFENDANTS PERSONAL PROTECTIVE SERVICES, INC. AND DEMONT MARROW'S MOTION TO SET ASIDE DEFAULT

Defendants Personal Protective Services, Inc. ("PPS") and Demont Marrow ("Marrow") (collectively, "Defendants") move the court pursuant to Federal Rules of Civil Procedure 55 and 60(b)[1] to set aside the default entered against them on January 29, 2013 [Docket No. 14]. This matter is appropriate for determination without oral argument pursuant to Civil L.R. 7-1(b). For the reasons below, Defendants' motion is GRANTED.

I. Background and Procedural History

Plaintiff Peter Dixon filed this case on October 9, 2012. [Docket No. 1.] He served the Complaint and summons on PPS by substituted service on October 11, 2012 and by mail on October 17, 2012, and on Marrow by personal service on October 11, 2012. Decl. of Michael Haddad ("Haddad Decl.") [Docket No. 22] at ¶ 3. An answer or responsive pleading was due from

[1] The court reaches its determination under Rule 55, and therefore declines to analyze the matter under Rule 60(b).

Defendant PPS on November 13, 2012, and from Defendant Marrow on November 1, 2012. *Id*. at ¶ 5.

Stan Teets, the President of PPS, explained that it is his custom and practice to "forward any complaints to PPS's insurance broker, One Risk, within a week of receipt." Decl. of Stan Teets ("Teets Decl.") [Docket No. 16-1] at ¶ 3. Upon receipt, One Riskthen forwards the complaint to PPS's liability carrier, Everest National Insurance. *Id.* Teets stated in his declaration: "I have no reason to believe that my custom and practice were deviated from when the complaint in this matter was received by Personal Protective Services, Inc." *Id.* Teets confirmed that on November 9, 2012, One Risk sent the Complaint to Everest National Insurance, requesting that it retain defense counsel to defend both PPS and Marrow. *Id.* at ¶ 4.

On November 16, 2012, Fred Benjamin, a representative from One Risk, called Plaintiff's counsel requesting an extension to file an answer on behalf of both Defendants. Haddad Decl. at ¶ 6. Plaintiff's counsel granted the request and extended time for the answer to December 17, 2012. *Id.* On December 12, 2012, Plaintiff's counsel contacted Benjamin to request that he stipulate to continuing the January 9, 2013 Case Management Conference. *Id.* at ¶ 7. Benjamin agreed on the condition that Defendants be granted another extension to file an answer. The parties agreed to extend that deadline until January 2, 2013. *Id.* The January 2 deadline passed without Defendants filing an answer or responsive pleading. *Id.* at ¶ 8.

On January 22, 2013, Plaintiff's counsel informed Benjamin that she intended to request entry of default, and offered Defendants another extension of time to January 25, 2013, to file an answer. Teets Decl. at ¶ 6; Haddad Decl. at ¶ 8, Ex. C. The same day, Benjamin retained the law firm of Bremer, Whyte, Brown & O'Meara to represent Defendants in this lawsuit. Decl. of Keith G. Bremer ("Bremer Decl.") [Docket No. 16-2.] at ¶ 2. Defendants' counsel claims that it "was not made aware that an answer needed to be filed by January 25, 2013 or a request for entry of default would be filed." *Id.* Between January 22 and January 25, 2013, Defendants' counsel "work[ed] on obtaining the necessary information to file an answer . . . ." *Id.* at ¶ 3. As of Friday, January 25, 2013, Defendants had failed to appear or otherwise respond to the Complaint. Haddad Decl. at ¶ 9. Plaintiff filed a request for entry of default that day. *Id.* The following Monday, January 28, 2013,

Defendants' counsel informed Plaintiff's counsel that it had been retained to represent Defendants. Bremer Decl. at ¶ 3. Later that day, Defendants' counsel learned that Plaintiff had already requested entry of default. *Id.* The Clerk of Court entered default as to Defendants on January 29, 2013. [Docket No. 14.]

II. Legal Standard

Rule 55(c) of the Federal Rules of Civil Procedure permits the court to "set aside an entry of default for good cause." Fed. R. Civ. P. 55(c). To determine whether a party has shown good cause, the court must examine "(1) whether [the party seeking to set aside the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no] meritorious defense; [and] (3) whether reopening the default judgment would prejudice any other party." *United States v. Signed Personal Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) [hereinafter *Mesle*] (brackets in original) (quoting *Franchise Holding II v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925-26 (9th Cir. 2004)) (quotation marks omitted). When performing this analysis, the court must remember that "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *Id.* at 1091 (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)) (quotation marks omitted).

III. Discussion

A. Culpable Conduct

The court will consider a party's conduct culpable if it "has received actual or constructive notice of the filing of the action and *intentionally* failed to answer." *Mesle* at 1092 (citations and quotation marks omitted) (emphasis in original). In this context, "intentionally" means that the party "must have acted with bad faith, such as an intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process." *Id.* (citation and quotation marks omitted). A party is culpable "where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond." *Id.* (citation and quotation marks omitted). "When considering a legally sophisticated party's culpability in a default, an understanding of the consequences of its actions may be assumed, and with it, intentionality." *Id.* at 1093.

Defendants' insurance broker, One Risk, knew about the Complaint by at least November 9, 2012, the date that One Risk contacted PPS's liability carrier. However, One Risk did not retain counsel for Defendants until January 22, 2013, after it had entered into three separate agreements with Plaintiff's counsel to extend the deadline for filing a responsive pleading. It appears that Defendants' insurance broker or insurer dropped the ball. However, simple carelessness, particularly by an insurer rather than a party, does not demonstrate culpable conduct. *Mesle* at 1092 ("It is clear that simple carelessness is not sufficient to treat a negligent failure to reply as inexcusable, at least without a demonstration that other equitable factors, such as prejudice, weigh heavily in favor of denial of the motion to set aside a default."). None of the cases cited by Plaintiff involve conduct by an *insurer* who fails to arrange for a timely response on a defendant's behalf. All of the cases cited by Plaintiff in support of the argument that Defendants were legally sophisticated parties whose failure to answer was intentional involve represented parties. Opp. at 9-10. Here, Defendants did not have representation until January 22, 2013. Moreover, there is no evidence that Defendants' failure to respond to the Complaint was the result of intentional, deliberate, manipulative, or bad faith conduct. The court therefore finds that Defendants did not engage in culpable conduct that led to the entry of default against them.

B. A Meritorious Defense

The moving party must "allege[] sufficient facts that, if true, would constitute a defense: the question whether the factual allegation [i]s true is not to be determined by the court . . . ." *Mesle*, 615 F.3d at 1094 (brackets in original) (citation and quotation marks omitted). Although this showing does not impose an "extraordinarily heavy" burden, *id.* (citation and quotation marks omitted), the party may not rely on "mere general denial without facts to support it." *Franchise Holding II*, 375 F.3d at 926 (citation and quotation marks omitted). Defendants have asserted that they were acting in self-defense and with probable cause. Mot. at 4; *see also* Declaration of Monique R. Donovan [Docket No. 24-1] at Ex. 2 (incident report containing facts Defendants allege support their affirmative defenses). Accordingly, Defendants have established the existence of a meritorious defense.

C. Prejudice

In order to establish prejudice, setting aside the default "must result in greater harm than simply delaying resolution of the case." *Mesle*, 375 F.3d at 1095 (citation and quotation marks omitted). In the present case, the court can discern no harm that will arise from setting aside the default against Defendants. Defendants filed this motion approximately two weeks after their last deadline for filing an answer. [Docket No. 16.] The litigation is still at an early stage, and permitting Defendants to file an answer or responsive pleading will not prejudice Plaintiff.

IV. Conclusion

For the reasons provided above, the court GRANTS the motion to set aside default judgment, and deems the Answer submitted as Exhibit 1 to the Declaration of Monique R. Donovan [Docket No. 24-1] filed as of the date of this Order.

IT IS SO ORDERED.

Dated: March 25, 2013

DONNA M. RYU
United States Magistrate Judge